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IN THE

# Supreme Court of the United States

**October Term, 1961**

**No. 635**

ABRAHAM KABOT,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

**(In Reply to Brief for the United States in Opposition)**

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### I. The Extortion—Entrapment Issue.

In its Brief In Opposition (p. 12), the Government acknowledges unequivocally for the first time in this case that the trial proofs in this bribery prosecution included judicially cognizable evidence of an extortion scheme by Federal Tax Agents antedating any alleged bribe offer by the petitioner ("We accept at its full face value, as we must in order to test its legal sufficiency, petitioner's evi-

dence concerning the inception of this alleged scheme."—Br. in Opp. 12). The court below had made a like acknowledgment (Pet., App. 12a).

This acknowledgment represents the third distinct position that the Government has taken in court in the course of this case concerning the proofs of antecedent extortion.

The Government's initial position, taken at the trial before a jury, was two-fold: (1) to keep the extortion proofs from the jury on grounds of "hearsay" and "irrelevancy" (see Appellant's Appendix in the Court of Appeals, 438a, 440a, 441a, 443a, 448a, 454a, 504a-505a, 506a, 536a-537a, 563a); and (2) to impugn the truthfulness of the extortion proofs and to minimize and deride them before the jury (see the Government's Summation, Appendix to Brief for the United States in the Court of Appeals, 234a-237a, 242a-243a, 245a-254a).

The Government's second position, taken by it in the Court of Appeals, was, again, to impugn and deride the extortion proofs (Br. For U. S. A., Ct. App., pp. 5, 6, 7 (fn. 3), 8 (and fn. 4), 9 (fn. 6), 12, 13, 14, 15, 16, 18 (and fn. 10), 20, 24, 39) while in the same breath seeking to disavow Agent "Gillis' apparent participation in this sordid affair" (Id. p. 41) when that seemed helpful to the Government's appeal strategy on another point in the case (the point as to failure by the Government to call Gillis as a witness—see Pet. 21-22).

And now, before this Court, taking its third position, the Government at last recites in a fair spirit substantial portions of the extortion proofs (Br. in Opp. 5-6), and concedes *arguendo* the "legal sufficiency" of those proofs for the purpose of testing petitioner's claim of enticement and entrapment (Id., p. 12).

Since the Government is now suggesting also, to this Court that the extortion proofs fail as a matter of law to raise the issue of enticement or entrapment because the official would-be extortionists were not acting for "governmental purposes" (Id., p. 11) and were "accomplices" or in a "conspiracy" with their victim (*ibid*), the following questions of sharpest new import arise:

If the Government's position is what we understand it to be, namely, that Keyser, over a period of some six weeks, could believably have been soliciting a bribe from Petitioner Kabot and ultimately succeeded in weakening or breaking down either Kabot or the taxpayer to the point where a bribe was given, is that not entrapment?

Was it not the exclusive province of the jury to determine whether such *arguendo*-conceded proofs supported the defense theory that Keyser's conduct as a whole amounted to entrapment?

At the very least, was it not purely a jury question, as to the period prior to October 28, 1958 when the *arguendo*-"extortion" situation existed, whether that phase was nothing other than "extortion", or whether it was part and parcel of an already then developing entrapment and enticement?

Since, under the Government's *arguendo*-concession, Petitioner Kabot was to be the *victim* of the extortion plot, can the Government be heard to urge that a victim is the same as a co-conspirator for the purposes of the defense of entrapment?

How can this review Tribunal be asked by the Government for the first time in the case to conclude that Petitioner

was not prejudiced by the Government's choice not to make this concession at the trial, when the jury itself was never permitted to pass on the defense which this belated concession now so persuasively underscores?

Is it due process for the Government to have sought to convict a citizen through the lips of a witness (Keyser) who was held forth to the jury as a virtuous Government official, and to have striven with might and main to impugn, to deride, to exclude from evidence, and to withhold from the jury's consideration all proof of this official witness' quite opposite character and conduct, when later the Government, with the conviction of the citizen lodged in its pocket, acknowledges for the first time to the Supreme Court of the United States that the excluded or withheld proofs were *arguendo* believable and, if believed, would have branded the supposedly virtuous official witness as corrupt?

Is it due process for the Government thus to have deprived the defendant of the opportunity of depicting to the jury that the official accuser-witness was actually deemed by the Government itself to be *arguendo* an accomplice witness and a co-conspirator?

The Solicitor General urges that evidence relevant to classic entrapment is not present, despite the concessions, because the *arguendo*-conceded purpose of Agent Keyser was not to prosecute on behalf of the United States but to extort for his own personal monetary profit (Br. in Opp. 11-12). And as regards Keyser's switch from extortion to entrapment on October 28, 1958—which the Solicitor General likewise treats as *arguendo* proved (Id. 12)—the Solicitor General replies only that there is no evidence that

"Keyser subjected petitioner to any pressure after that day to continue with the corrupt plan which had already been begun" (*Ibid*). Apart from the fact that this last ignores the substantial proofs that it was Keyser who carried the evil design to the defendant even on and after October 28, 1958 and not *vice versa* (Pet. 10), this entire argument of the Solicitor General simply leaves unanswered our point that the original implanting of the evil design was done by the Government's Agents, *i.e.*, our point that Keyser's switch on October 28, and the aftermath of undisputed "artifice and stratagem" (Br. in Opp. 13; Pet. 10), are necessarily integral with the antecedent extortion attempts. The Government's sole focus is on the idea that it was only on and after October 28, 1958, that Keyser's purpose was to prosecute—*i.e.*, classic entrapment. But, is it of no legal or constitutional significance that this later purpose of Keyser was generated directly out of his prior corrupt purpose? Is it of no significance that all of this evolved at the hands of persons whom the Government had seen fit to clothe with official authority?*

Nothing in the Solicitor General's presentation meets the fundamental point—a point whose constitutional thrust for governmental morality is deeper than that of the classic entrapment doctrine itself—that in its overall impact on Petitioner Kabot's rights of due process the Government's case against him is an unconstitutionally tainted one (Pet. 12-16).

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* The Brief In Opposition is silent on this important question of the Government's responsibility for the acts of individuals whom it chooses to clothe with such official authority. See Pet. 14.

## II. The Issue of "Inconsistent Defenses".

On the question of "inconsistent defenses" (entrapment plus denial of guilt), the Solicitor General (Br. in Opp. 13-14) cites the familiar decisions which, as we noted in our petition (pp. 19-21), hold or state that a defendant who denies commission of any guilty acts may not rely upon entrapment. However, the Solicitor General does not mention our point (Pet. 21-22) that none of those decisions *examine* the supposed "rule" against such "inconsistent defenses" but merely assume its existence.

The Solicitor General, in the spirit of fairness which animates his Brief, does apparently agree that we are correct in cataloguing the numerous cases (Pet. 19-21) in which "instructions on entrapment have in fact often been given where commission of the offense has been denied" (Br. in Opp. 13).*

Furthermore, while the Solicitor General essays to distinguish—not very insistently, it seems—the Fifth Circuit's decision in *Henderson* v. *United States*, 237 F. 2d 169 (Br. in Opp. 13-14), he does not mention the separate opinion of Justices Brandeis and Butler in *Casey* v. *United States*, 276 U. S. 413, 424, which is the only expression on this subject in this Court (Pet. 3, 17-18, 20-21), as *Henderson* (*supra*) is the only Federal lower-court decision which examines the "rule" rather than merely assuming its operativeness (Pet. 3, 18, 20-21).

Finally, the Solicitor General, we submit, does not correctly state the posture of the "inconsistency" of the de-

* Quite different was the Government's treatment of these decisions in the Court of Appeals, where the decisions were laboriously attempted to be distinguished by the United States Attorney's Office (Br. for U. S., Ct. App. 21-24).

fenses as presented on the instant record. He states (Br. in Opp. 13) that Petitioner's "own version of the facts contradicted the entire theory of the defense". But this overlooks that petitioner's "version of the facts"—which was substantially if not wholly uncontradicted (Pet. 7-9)—included the entire *probatum* as to the Gillis-Keyser extortion attempts which we claim constituted the original implanting of any allegedly evil design (Pet. 13-14).

Most noteworthy, however, is the Solicitor General's seeming assent (Br. in Opp. 13) to our demonstration that the Federal Circuits are in conflict concerning the supposed rule against the "inconsistent defenses" of entrapment and complete denial of commission of the offense (Pet. 18-22).

## III. The Electronic Eavesdrops.

The Solicitor General offers no reply (Br. in Opp. 14-15) to our point (Pet. 25) that eavesdrop evidence may be excludable when "an Agent • • • violated any federal law" (*On Lee* v. *United States*, 343 U. S. 747, 754). That is, the Solicitor General has no reply to our point that the eavesdrop evidence herein was obtained by a Government officer (Keyser) who the defense alleged had just attempted in this very same matter to commit extortion—a violation of 18 U.S.C. §872 and to solicit a bribe—a violation of 18 U.S.C. §202.

The Solicitor General minimizes the significance of the recordings at the trial owing to their inaudibility (Br. in Opp. 14), but he does not mention that the supposed audibility and accuracy of the recordings were continuously touted by the prosecution through improper use of the al-

leged stenographic transcripts of those recordings even though those transcripts had been ostensibly excluded from the case under a ruling by the trial court (Pet. 24). The Solicitor General mentions the latter ruling by the trial court (Br. in Opp. 14) but not the prosecution's persistent defiance of that ruling.

Altogether surprising is the Solicitor General's argument (Br. in Opp. 14-15) that the recordings were unimportant because their probative weight "related principally to the first count, the offering of a bribe," the evidence as to the second count (the giving of a bribe) being characterized by the Solicitor General as "conclusive"—with which last we no wise agree (Pet. 10-11). This argument assumes, quite artificially, that a jury passing on a charge of *giving* a bribe would invariably convict just as readily when it did not believe the bribe had been offered as when it did believe the bribe had been offered.

## IV. The Failure to Call Gillis as a Witness.

The Solicitor General pitches his case concerning this issue primarily on the argument that Gillis' extortion attempts were "ultimately irrelevant" (Br. in Opp. 14). If we are correct that those attempts were acutely relevant to the entrapment issue this argument evaporates and the failure to call Gillis as a witness becomes an important element in the Government's suppression of exculpatory evidance. See Pet. 21-22.

## V. The Instruction on Character Evidence.

The Government, in relying on *United States v. Crosby*, 294 F. 2d 928, 947 (C. A. 2, 1961) (Br. in Opp. 15-16) involving an instruction like the one of which we complain (Pet. 28) as to a defendant's possibly not having revealed his true character to the character witnesses—does not mention that in *Crosby* this portion of the charge was not in issue at all and that the Court made no ruling addressed thereto and did not refer to it in any specific way. The issue as to this portion of the *Crosby*-type charge which we here raise appears to be *de novo*. The harmful effect of this portion of the charge was especially grave in the overall circumstances of our case, where the issue of credibility was crucial and the extremely impressive array of distinguished character witnesses could have lent decisive support to the credibility of the defendant if the court had not charged in that manner (Pet. 28). The exception taken by the defense at the trial, "There is no such proof in the case" (D604a), points up the error of the court's suggestion to the jury that it could rely on conjecture rather than established fact.

## VI. The Instruction as to the Merits of the Tax Case.

The Solicitor General's only support for his argument that (Br. in Opp. 16 n.) "The charge did not instruct the jury not to consider the tax as bearing on the motive of Petitioner in the alleged bribery", is that (*ibid*) "the charge explicitly said that the tax should be considered in connection with the issue of 'whether, if you believe it to be a fact, the offer to bribe or the bribe itself was made

with the intent to influence [Mr. Keyser's] decision in that matter' (I. R. 593)".

The portion of the charge thus quoted by the Solicitor General was utterly unavailing to undo the grievous harm of which we complain (Pet. 26-27). This is evident when the relevant part of the charge—and especially its concluding sentence, which immediately follows the portion quoted by the Solicitor General—is read as a whole (D593a):

> "*Finally and most important of all, we are not concerned with the correct amount of tax that was or was not to be assessed against the van Bergs or their corporations.* Although at times it seemed like we were trying an income tax case, we were not trying one. The only matter concerning taxes that you should concern yourselves with at all is whether or not Mr. Keyser in his official capacity was making an audit of the van Bergs corporate and personal books in order to determine whether or not taxes were due and owing from these taxpayers to the United States and whether, if you believe it to be a fact, the offer to bribe or the bribe itself was made with the intent to influence his decision in that matter. *It is completely immaterial whether Mr. Keyser is correct or not correct in his conclusions as to the existence of tax deficiencies by these taxpayers.*" (Emphasis supplied)

## CONCLUSION

**For the reasons stated in the Petition and in this Reply Brief, a writ of certiorari should issue.**

Respectfully submitted,

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